DO CONSTITUTIONAL LIMITATIONS CONTROL REFORMERS?

Mr. Justice Holmes, who loves a legal paradox, has said that notwithstanding constitutional limitations the police power might be exercised "in aid of what is held by strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[1]

Recent decisions of the Supreme Court have applied this generalization to war time prohibition and have settled in advance many questions relating to constitutional prohibition. One question, however, which has not been directly answered because it has not been asked, is whether the National Prohibition Act, in so far as it prohibits the sale and possession of intoxicating liquor, applies to stocks of liquor on hand before the Eighteenth Amendment was adopted.

Theoretically this should depend upon the answer to one, or both, of two questions: Is the power of the United States in the premises subject to constitutional limitations? And if so, is the absolute, or practically absolute, prohibition against the sale and possession of liquor in the hands of one who became its owner while it was still a lawful article of merchandise a deprivation of his property without due process of law?

If the Fifth Amendment applies, the first question is answered in the affirmative. But if it be suggested that the Eighteenth Amendment is on its face a new and unlimited grant of police power, one may still ask where the power came from. The several states do not possess, and cannot grant, unlimited police powers. Most of them are forbidden by their own constitutions to take away property without due process of law, and all of them are forbidden to do so by the Fourteenth Amendment. It might be said that an amendment proposed by a constitutional convention or adopted by state conventions was a grant of power directly from the people; but an amendment proposed by a constitutionally restrained Congress, and adopted by constitutionally restrained state legislatures, would seem to be congenitally limited so far as individual property rights are concerned.

The relevant judicial history of the second question may be outlined as follows: In 1856 the New York Court of Appeals held that a statute prohibiting the sale of liquor was unconstitutional, in so far as it operated on property in intoxicating liquor existing when the Act took effect.[2]

In 1873 an attempt was made to bring the same question before the Supreme Court, but the plaintiff in error had failed to make his plea specific, and the point was dismissed with the following comment:

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[1] *Noble State Bank v. Haskell* (1910) 219 U. S. 104, 111, 31 Sup. Ct. 186, 188.

[2] "The right of sale is of the very essence of property in any article of merchandise; it is its chief characteristic; take away its vendible character and the article is practically destroyed." *Wymehamer v. People* (1856) 13 N. Y. 378, 456. *Cf.* also (1918) 27 YALE LAW JOURNAL, 393.

"But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for judicial action by this court. Both of these questions whenever they may be presented to us are of an importance to require the most careful and most serious consideration."[3]

In *Beer Company v. Massachusetts,* the court said:[4]

"We do not mean to say that property actually in existence, and in which the right of the owner has been vested, may be taken for the public good, without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa,* 18 Wall. 129, was not in existence when the liquor law of Massachusetts was passed."

In *Eberle v. Michigan,* the point was again pressed and again left undecided.

"It was further contended that the act takes property without due process of law because it made no provision for the sale of liquor on hand at the time the law became operative. But the record does not call for a decision of that question, nor does it bring the case within the principle, suggested in *Bartemeyer v. Iowa,* 18 Wall. 129, 133, that a statute absolutely prohibiting the sale of property in existence at the time of the passage of the law would amount to confiscation and be void as depriving the owner of his property without due process of law."[5]

In *Barbour v. Georgia,* the plaintiff in error had acquired the liquor in question after the Georgia prohibition act was enacted, but before it became operative, and the court held that he took it with full notice of its infirmity and with knowledge that after a day certain his right to possess it would cease; but the court observes that,

"Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartemeyer v. Iowa,* 18 Wall. 129, and *Beer Company v. Massachusetts,* 97 U. S. 25, 32-33; but was not decided."[6]

Finally the question was brought squarely before the court in *Hamilton v. Kentucky Distilleries Company* (Dec. 15, 1919) U. S. Sup. Ct. Oct. Term, No. 589, where the constitutionality of the War Time Prohibition Act was attacked on the ground, among others, that

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[3] *Bartemeyer v. Iowa* (1873, U. S.) 18 Wall. 129, 133.
[4] (1877) 97 U. S. 25, 32.
[5] (1914) 232 U. S. 700, 706, 34 Sup. Ct. 464, 466.
[6] (1919) 249 U. S. 454, 459, 39 Sup. Ct. 316.

it violated the Fifth Amendment by prohibiting the sale, for beverage purposes, of—"any distilled spirits," including spirits on hand before its enactment. The Act did not take effect until July 1st, 1919; and the Court said:

"But no reason appears why a state statute, which postpones its effective date long enough to enable those engaged in the business to dispose of stocks on hand at the date of its enactment, should be obnoxious to the Fourteenth Amendment, or why such a federal law should be obnoxious to the Fifth Amendment. We cannot say that seven months and nine days was not a reasonable time within which to dispose of all liquors in bonded warehouses on November 21, 1918."

It may be surmised from this ruling that the Court will also hold that the sale of liquor on hand before the adoption of the Eighteenth Amendment may be constitutionally prohibited by the National Prohibition Act; unless, indeed, it takes a shorter cut to the same result by holding that the Eighteenth Amendment grants unlimited police power to the United States in respect to intoxicating liquor.

Yet it is interesting, from an academic standpoint, to pursue the subject a little further; especially so, because this part of the opinion is not reasoned, but based on the following statement:

"The uncompensated restriction on the disposition of liquors imposed by the act is of a nature far less severe than the restrictions upon the use of property, acquired before the enactment of the prohibition law which were held to be permissible under the Fourteenth Amendment."

Mugler v. Kansas[7] and *Kidd v. Pearson*[8] were cited in support.

It is submitted that the analogy is imperfect. Restrictive regulations, however severe, on the use or sale of existing property, may be and are upheld on the ground that they do not amount to a deprivation of property.

The *Mugler* case went far, but the plaintiff in error still retained the privilege of using his brewery, except for the forbidden purpose,[9] and the right to sell it.

On the other hand, an absolute, or practically absolute prohibition against selling existing property after a day certain, amounts to a total extinguishment of one of the essential rights of ownership when that day arrives. And it is no answer to say that the owner was given a reasonable opportunity to sell, for, if it be his property, he has as good a "right" to keep it as to sell it.

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[7] (1887) 123 U. S. 623, 8 Sup. Ct. 273.

[8] (1888) 128 U. S. 1, 9 Sup. Ct. 6.

[9] It does not appear in the statement of facts that Mugler was fined for selling beer made before the Kansas statute went into effect, but that fact is not noticed in the reported arguments or in the opinion, the relevant parts of which deal only with the restriction on the use of the brewery, resulting in loss of value.

A law which requires the owner of property to sell it before a day certain or not to sell it at all, compels him to choose whether he will be absolutely deprived of his privilege of selling it, or will relinquish under compulsion of law his privilege of keeping it.

The distinction, which Mr. Justice Brandeis obliterates by a descriptive phrase, between forbidding the future manufacture of liquor or the sale of liquor thereafter made, and forbidding the sale of existing stocks of liquors, was fully recognized in *Beer Company v. Massachusetts,* and *Eberle v. Michigan,* and by Mr. Justice Brandeis himself in *Barbour v. Georgia.*

Liquor lawfully made and acquired was property when the War Time Prohibition Act was passed; and the privilege of selling it was one of the essential attributes of ownership.

No doubt any property which becomes dangerous to the public welfare may be destroyed without compensation; but it is submitted that existing property which has not changed cannot be converted into a public nuisance by a mere legislative declaration; unless, indeed, constitutional limitations do not control reformers.

Since the above comment was written the Supreme Court has pursued the reasoning, or the state of mind, of the *Kentucky Distilleries* case to its necessary conclusion. If an absolute prohibition against the sale of merchandise is, as that opinion declares, merely a limitation on its use, then there is no necessity for postponing the effective date of the prohibition in order to give the owner a reasonable opportunity to dispose of stocks on hand.

It is so held by a divided court in *Ruppert v. Caffey* (Jan. 5, 1920) U. S. Sup. Ct. Oct. Term 1919, No. 603. The point decided, as described in the dissenting opinion is, that Congress had power "directly and instantly to prohibit the sale of a non-intoxicating beverage, theretofore lawfully produced, and which until then could have been lawfully vended, without making any provision for compensation to the owner."

The prevailing opinion, persisting in the unreasoned assumption of the *Kentucky Distilleries* case, states the same result thus: "Here, as in *Hamilton v. Kentucky Distilleries Company, supra, there was no appropriation of private property, but merely a lessening of value* due to a permissible restriction imposed upon its use."

What will the Court say to the National Prohibition Act, which prohibits possession as well as sale? Is that also merely a permissible restriction on the use of property lawfully owned when the Act was passed?

J. K. B.